IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEALS NO.56 AND 65 OF 2003 AND 8/2004.

CRIMINAL APPEAL NO. 56 OF 2003.

Shri Prakash Parab,
Central Jail, Aguada. ... Appellant.

VERSUS

S T A T E. ... Respondent.

Shri S.G. Dessai, Senior Advocate with Shri Shivan Dessai, Advocate for the Appellant.

Ms. W. Coutinho, Addl. Public Prosecutor for the State/Respondent.

CRIMINAL APPEAL NO. 65 OF 2003.

Shri Rupesh @ Topo Gawali. ... Appellant.

VERSUS

S T A T E. ... Respondent.

Shri D. Pangam, Advocate under Legal Aid Scheme for the Appellant.

Ms. W. Coutinho, Addl.Public Prosecutor for the State/Respondent.

CRIMINAL APPEAL NO. 8 OF 2004.

Shri Ramesh Jadav. ... Appellant

VERSUS

State. ... Respondent.

Shri D. Pangam, Advocate under Legal Aid Scheme for the Appellant.

Ms. W. Coutinho, Addl. Public Prosecutor for the State/Respondent.

CORAM: S.A. BOBDE &
N.A. BRITTO, JJ.

DATE OF RESERVING THE JUDGMENT; 27.07.2004
DATE OF PRONOUNCING THE JUDGMENT: 23.08.2004

J U D G M E N T: (PER BRITTO, J.)

These appeals have been filed by the accused in Sessions Case No. 30/2001. The said accused have been tried, convicted and sentenced by the learned Addl. Sessions Judge (I), Panaji, under Sections 302, 392 r/w Section 34 I.P.C. by his Judgment and Order dated 31.7.2003.

2. A bare outline of the case of the prosecution is that the deceased Peter Pereira (Peter Uncle) aged about 55 years, was at the relevant time, residing alone in his house at Umtavado in Calangute, his two other brothers residing elsewhere in the same ward. He was visited last by his son P.W.3 Marcelino on 7.4.2001 at about 10 to 11 a.m. along with his own son aged about three years. P.W.3 Marcelino after having conversed with his said father Peter, went away. On the next day i.e. 8.4.2001 at about 3 p.m. one Sheila with another old lady went to see the deceased Peter. The said Sheila was one of the tenants of the deceased Peter and after having knocked at his door, found that there was no

response, and they reported the matter to P.W.5 Mumtaj and then they all reported the matter to the eldest daughter-in-law of the deceased and the latter informed P.W.3 Marcelino to go to the house of Peter. P.W.3 Marcelino then came to the house of the deceased Peter and found by seeing through the window that his father was lying on the bed in an awkward position with blood stains and also found that the clothes in the house were scattered all over. He tried to shout and wake up the deceased but that was of no use and then tried to push the door and found it locked from inside and therefore he took a ladder and entered the house through the roof and found that his father was cold with blood on his face and injury marks on his head. He also noticed the gold ornaments namely a chain, a pendant, two rings and a watch missing. P.W.3 Marcelino was followed to the house by one of the brothers of the deceased, namely, P.W.1 Alex who was informed by his nephew about the incident and who also saw his brother, the deceased, lying on the bed full of blood and he also saw that the torch which was being used by his brother, bent and with blood. He also found the gold ornaments worn by his deceased brother missing and therefore he proceeded to the Police Station where he lodged his complaint which was written down by P.W.31 P.I. Shri Banaulikar who was then the Inspector-in-charge of

the Calangute Police Station and who registered the same against unknown culprits under Sections 450, 302 and 392 I.P.C. Upon registering the said F.I.R. P.W.31 P.I. Banaulikar reached the scene accompanied by a dog squad, finger print expert and a photographer. He then prepared a scene of offence panchanama - Exh.PW2/A, in support of which P.W.2 Alex has been examined. P.W.2 Alex apart from describing as to what he saw at the scene had particularly stated that in the room where the body was found there was blood seen on the walls. He produced the sketch prepared by P.I. Shri Banaulikar at Exh.PW.2/B. Shri Banaulikar also prepared an inquest panchanama which is supported by P.W.2 Alex and thereafter sent the dead body for post mortem examination. It has been recorded in the scene of offence panchanama that the services of the dog squad and the finger print operator which were pressed into service did not give any clue. 25 photographs taken by the Police photographer P.W.21 Reginaldo have been produced at Exh.76.

3. The post mortem examination of the dead body was conducted by P.W.7 Dr. Sapeco on 9.4.01 and the autopsy report has been produced by him at Exh.P.W.7/B. Dr. Sapeco found on the person of the deceased about 11 external injuries which have been

described by him on page 3 of his report. The said injuries were (i) A CLW with dried blood around the bridge of the nose; (ii) A CLW with dried blood around and between the eye brows; (iii) A CLW with dried blood around the left eye brow along inner 2/3rds. (iv) Bruise at frontal region of scalp beyond area between eye brows. (v) red bruises on the right cheek; (vi) red bruise on the upper lip's mucosa; (vii) red bruise on lower lip's mucosa; (viii) Oblique abrasion on the left outer aspect of neck; (ix) CLW with dried blood around with red bruises on left upper eyelid; (x) red bruise on the dorsal aspect of left ring finger's base; and (xi) contused lacerated wounds with blood on palmar aspect of left ring finger's lowest crease region. Dr. Sapeco also noticed that every bruise had 1 cm. deep effusion of blood within its tissues. The dimensions of the said injuries have been given by Dr. Sapeco, which we consider unnecessary to be mentioned here. As regards the internal injuries Dr. Sapeco has stated that upon dissection of scalp he had found effusion of blood under injuries no.2, 3 and 4 and that there were fractures for the roof of both orbital plates and that there were fractures of nasal bones underneath external injury No.1. He also stated that there was diffusion of subdural and subarchanoid blod clots at frontal and occipital

regions of brain. Dr. Sapeco opined that the death was caused within 48 hours of preservation of the dead body in the morgue and that the death was caused due to facial and cerebral damage caused due to impact of blunt force or object due to cumulative effect of injuries (i) to (vii) and (ix) which were ante mortem in nature and within six hours prior to the death and which were fatal in the ordinary course of nature. According to Dr. Sapeco the said injuries could have been caused by a metal torch (MO.1). The said torch was shown to be of six cells. Dr. Sapeco was not cross-examined by the defence regarding the opinion given by him.

4. However, we are rather surprised to note that what Dr. Sapeco as a medico-legal expert could not see was seen by PW.31 P.I. Shri Banaulikar and P.W.2 Alex. P.W.2 Alex stated that there were injuries on the legs. The inquest panchanama mentions 3 injuries on left foot and another injury on the right heel. The relevant photo also shows injury on the leg.

5. The needle of suspicion was probably first pointed towards A.2 Rupesh as he was ex-tenant of the deceased and had left the place without telling anybody and as a result a wireless message was sent on 9.4.01 showing that he was strongly suspected in

the commission of the offence. That wireless message was produced at Exh.103 Colly. On the same day another wireless message was sent regarding A.1 Prakash and A.3 Ramesh, that they too were strongly suspected in the commission of the offence. This wireless message was also produced as Exh.103 Colly. According to P.I. Shri Banaulikar he received information from the brother of A.2 Rupesh that A.2 Rupesh was in judicial lock-up and was released on 21.3.2001 and prior to that when A.1 Prakash and A.2 Rupesh were in judicial lock-up they had become good friends and were always seen together in the lock-up and he was also informed that the A.3 Ramesh was visiting them and therefore search of their respective houses were taken but they could not be found until A.1 Prakash was arrested on 10.4.01 when he came with black colour scooter and who later admitted having committed the murder along with A.2 Rupesh and A.3 Ramesh.

6. The case of the prosecution is based on circumstantial evidence.

7. The learned Trial Court, after considering the various circumstances, has come to the conclusion that the prosecution has proved its case beyond reasonable doubt against the accused.

8. Amongst the circumstances proved by the prosecution against the accused, the first is the last seen circumstance.

9. P.W.5 Mumtaj stated that on 5.4.2001 at about 2p.m. she was washing utensils outside her room when she saw accused no.2 Rupesh standing behind her room and another person with curly hair with him whom she had identified as A.3 Ramesh. According to her, the said A.3 Ramesh came near her and asked her whether one lady by name Rosie was staying in the same locality and that she told him that the said Rosie had left the place. According to her, the said Rosie is the wife of A.2 Rupesh and while she was talking to accused No.3 Ramesh, A.2 came near her and asked her whether any room was vacant as A.3 Ramesh was looking out for a room on rent and she told him that all the rooms were full and further told him that Peter (deceased) had slept and should not be disturbed and inspite of telling them to go, they did not leave the place and she found their conduct to be suspicious. On the basis of her evidence, the learned trial Court found that A.2 Rupesh was found moving suspiciously but found that the identification of A.3 Ramesh by P.W.5 was doubtful, but what could flow from that evidence was that A.2 Rupesh was accompanied by another person and their movement was

suspicious. Apparently, A.2 Rupesh was a well known person to P.W.5 Mumtaj as previously A.2 Rupesh was residing in the locality and he being found there would not take the prosecution anywhere. P.W.5 Mumtaj had failed to identify A.3 Ramesh in the test identification parade held by P.W.22 Shri Alornekar. Therefore her identification of A.3 Ramesh before the Court, was rightly not accepted. However, the same thing could not be said regarding the evidence of her son P.W.4 Yousuf.

P.W.4 Yousuf had deposed that at about 11 a.m. on 7.4.2001 he saw A.2 also known as Abhi proceeding towards the beach and he saw A.1 and A.3 near the door of Peter Pereira talking loudly to him who was inside his room, but he did not hear the exact words. He clarified himself by stating that when he came out of his room he saw all the three accused and then saw A.1 and A.3 proceeding towards the door of Peter and Accused No.2 proceeding towards the beach. He stated that subseqeuntly he was called upon to identify the said persons on 6.5.2001 and he identified the said persons. In his cross examination he had stated that he had seen A.1 on that day with full sleeves shirt and a long pant and had seen him for the first time and thereafter at the parade. He categorically stated that he had not seen A.1 on any day after

7.4.2001 and before the said I.D. parade. He had denied the suggestion that he had seen A.1 at the Police Station or that he was shown the photographs of A.1. As regards A.2 also he had stated that he had seen him 5 metres away, and as regards A.1 and A.3 he stated that he had not seen them before he was taken to the room in which the I.D. parade was held.

10. The evidence of P.W.4 Yousuf is sought to be assailed by submitting that if the motive for the offence was robbery as alleged by the prosecution, there was no question of the accused creating evidence against thesmelves by loudly talking to the deceased by standing outside the house of the deceased and therefore the evidence of P.W.4 Yousuf is inherently improbable. It is also submitted on behalf of the accused that the identification parade was held belatedly on 6.5.2001 and when A.1 Prakash was arrested earlier on 10.4.2001 and a doctored identification was therefore possible. In our view, the said submissions cannot be accepted at all. P.W.4 Yousuf was a student and might have been a one time neighbour of A.2 Rupesh when he was residing in the locality as a tenant of the deceased. P.W.4 Yousuf has consistently identified A.1 Prakash and A.3 Ramesh as the persons seen by him talking to the deceased not only at the test identification

parade but also before the Court. No reason has been assigned on behalf of the defence as to why P.W.4 Yousuf deposed in a manner he did. P.W.4 Yousuf was at the relevant time a student and his evidence has been found acceptable by the learned trial Court. We do not find it infirm to be rejected. As regards the test identification parade, there is no doubt that the same was not immediately held, but that in itself would not be a reason good enough to reject the identification of the said accused by P.W.4 Yousuf. Identification parades are held with twofold objectives. Firstly, to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them either in the commission of the offence or at a particular place. The second is to satisfy the investigating authority that the suspect is the real person whom the witnesses had seen in connection with the occurrence of the crime. The case of **Joginder Singh @ Jaggi v. State** (1990 Cri.L.J. NOC 30) is of no assistance to the accused. It was a case where the complainant had not given any physical features of accused but had identified him for the first time before the Court and it was therefore held that the accused could not be convicted on the basis of that evidence. In the case of **Sarwan Singh v. State of Punjab** [(2003) 1 SCC 240] the Supreme Court has

stated that ordinarily identification of an accused for the first time in Court by a witness should not be relied upon for the purpose of passing the order of conviction without a definite corroboration since identification for the first time in Court cannot possibly be termed to be non-admissible but it is a matter of prudence and jurisprudential requirement that the same should be upon proper corroboration since otherwise justice delivery system may stand affected. The purpose of a proper test identification has always been to test and strengthen the trustworthiness of that evidence and it is generally considered as a safe rule of prudence to look for corroboration of the sworn testimony of a witness in court as to the identity of an accused who are otherwise strangers to them in the form of earlier identification proceedings. The Supreme Court in the case of **Malkha Singh** [(2003) 5 SCC 746] has held that in appropriate cases the Court may accept the evidence of identification in court even without insisting on corroboration. We are unable to accept that only because P.W.4 Yousuf saw A.1 Prakash and A.3 Ramesh talking loudly, that his evidence deserves to be discarded. One really does not know what made A.1 Prakash and A.3 Ramesh to talk loudly to the deceased. Probably it was because the deceased was refusing their entry to the house. All

criminals, however carefully they may plan a crime, are always known to leave some clues behind. Only because the said accused were found talking loudly does not mean that the evidence of P.W.4 Yousuf should be discarded. We are unable to accept the contention that A.2 Rupesh had moved away from the place towards the sea shore. It is quite probable that A.2 Rupesh, on seeing P.W.4 Yousuf, who was otherwise known to him, only pretended to move away since the other circumstances which will be referred to later, show his presence at the scene. The evidence of PW.4 Yousuf cannot be rejected because his version was not supported by his mother. There was no cross-examination to find out whether PW.5 Mumtaz was at all present, when PW.4 Yousuf saw all the accused near the house of the deceased. Therefore, there are no inherent contradictions in their versions, as submitted. The accused have given no explanation regarding this circumstance proved by the prosecution against them. This ciricumstance, in our view was duly proved by the prosecution as rightly held by the learned Trial Court. In our opinion, it was necessary for the accused and particularly A.1 Prakash and A.3 Ramesh to have explained under what circumstance they parted company of the deceased when they were last seen talking to him. In the case of **Sahadevan v. State** [(2003) 1

SCC 534] the Supreme Court has held that in more than one case they have held that if the prosecution, based on reliable evidence, establishes that the missing person was last seen in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstance in which the missing person and the accused parted company. This is a fit case therefore to draw an adverse inference against the accused in the death of the deceased because they were last seen with him.

11. The second circumstance sought to be proved are admissions by the accused. These admissions did not find favour with the learned trial Court who found that the admissions by the accused were hit by Section 26 of the Evidence Act. This circumstance requires a little closer examination. All the accused after they were arrested were sent by the I.O. Shri Banaulikar for medical examination and were examined by P.W.8 Dr. Rodrigues on 10.4.01 and 14.4.01, respectively. The certificates on their examination have been produced. According to Dr. Rodrigues, A.1 Prakash had multiple horizontal to oblique linear scratches abrasions in an area of 10 x 6 cms on middle front of left forearm; horizontal scratches abrasions of 3 cms. linear over middle front outer aspect of right forearm; abrasion with

scab separation on middle back of left shoulder and linear scratches abrasions 3 cms. on upper back of right shoulder.

12. The history given by A.1 was recorded by P.W.8 as follows:-

" That on Saturday the 7th April, 2001 at 11 a.m., in the morning, Mr. Topo, r/o Gaunswadi and Jadhav, r/o Shelpem, Mapusa enticed me to kill one old uncle who was known to both of them as they were known to him and accordingly all three of them went to the house of the uncle. Mr. Jadhav knocked at the door and when uncle opened the door, Jadhav and both of us caught the neck of uncle and put him on the bed and he became unconscious and Topo hit him on the head with the torch found nearby then Jadhav removed the ring from Uncle's finger and also chain and locket from showcase and handed over to me which I sold to goldsmith in Vasco for Rs.10,350/- and then all three of us stayed in Baina with the prostitutes for two days".

13. The history given by A.2 Rupesh was recorded as follows :-

" That on Friday the 6th April, 2001 at noon

time I along with Prakash alias Tutu decided to kill Uncle and rob him of money and ornaments. I also hit uncle with torch and also pressed his neck. Then all three of us went to Baina for a few days. I was given Rs.3500/- by Prakash".

14. The history given by A.3 Ramesh was recorded as follows :-

" I along with Prakash and Rupesh decided to kill Uncle and rob him of money and other ornaments which we all executed together and then we went to Baina and stayed there for few days ".

14A. On behalf of the State, it has been submitted that the admissions by the accused before the Medical Officer are relevant and is one of the circumstances proved by the prosecution against the accused. On the other hand, it has been submitted on behalf of the accused that the extra judicial confession of the accused was rightly rejected by the Trial Court as being hit by Section 26 of the Evidence Act which stipulates that confessions by accused while in custody of police are inadmissible unless they are made in the immediate presence of a Magistrate. On behalf of A.2 Prakash and A.3 Ramesh, reliance has been placed on the case of **Aghnoo Nagesia v.State of**

Bihar (A.I.R. 1966 S.C., 119). On behalf of the State, reliance has been placed on the cases of **State of Kerala v. Amini and ors.** (1988 Cr.L.J. 107) and the case reported in **Ammini and others v. State of Kerala** (A.I.R. 1998 S.C. 260).

15. In the case of Aghnoo Nagesia v. State of Bihar (supra) the Supreme Court, inter alia, observed that:- " If an admission of an accused is to be used against him, the whole of it should be tendered in evidence, and if part of the admission is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only." .... " But this principle is of no assistance to the accused where no part of his statement is self-exculpatory, and the prosecution intends to use the whole of the statement against the accused ". The Supreme Court further observed that sometimes a single sentence in a statement may not amount to a confession at all, but the statement read as a whole can amount to a confession and it would not be permissible to admit in evidence each sentence separately as a non-confessional statement.

16. The case of **Aghnoo Nagesia** (supra) along with the case of **Kanda Padayachi v. State of Tamil Nadu** (A.I.R. 1972 S.C. 66) came up for consideration

before the Full Bench of the Kerala High Court in the case of **State of Kerala v. Ammini and others** (1988 Cri.L.J.107). In this case the Doctor had noticed three wounds on the right fingers of the third accused and the said third accused when questioned as to the cause of the said injuries had told the Doctor that: "These small injuries were caused by biting when I closed Merly's mouth to silence her at 7.30 p.m. on Monday before last". The admissibility of the said admission was questioned on the ground that the statements were hit by S.26 of the Evidence Act which prohibited a confession made by a person "whilst he is in th custody of a police officer". The Full Bench observed that what is prohibited was only "confession" and the embargo is not extended to the statements which do not amount to confession. Admissions can be proved as against the person who makes it, and Section 21 of the Evidence Act permits such admissions being proved. The contours of S.21 are not bounded by limitations of the person being in the custody of a police officer. There is no doubt that if the admission amounts to "confession" it transgresses into the forbidden field designed in S.26. What is a "confession"? Neither the Evidence Act nor other statutes on criminal law defines confession. Privy Council, way back in 1939 in **Narayana Swami v. Emperor,** (AIR 1939 PC 47), made

the endeavour to explain the word "confession" as used in the Evidence Act. Lord Atkin who delivered the famous judgment in that case stated thus:-

" The word "confession" as used in Evidence Act cannot be construed as meaning a statement by an accused "suggesting the inference that he committed the crime". A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. "

17. The Full Bench further observed that the Supreme Court adopted the aforesaid explanation as correct in the case of **Palvinder Kaur v. State of Punjab** (A.I.R. 1952 SC 354). In **Aghnoo Nagesia** (supra) the Supreme Court considered the question of severability of the accused's confession while in custody, one exculpatory and the other inculpatory. In the context, the Supreme Court found it worthwhile to adopt the same line of thinking about confession and the principle followed in **Palvinder Kaur's** case were reaffirmed. The important decision on this subject in view of the context in this case, is **Kanda Padayachi** (supra) the subject dealt with in that decision is the admissibility of a statement made by

an accused, in police custody, to a Doctor regarding some minor injuries found on his person to the effect that "it was the deceased who, at about midnight, on July 10, 1969 had caused the injury on his the (sic) by biting him" . The Supreme Court made reference to the case law on the subject including Pakala Narayana Swami's case and held that the statement in question did not amount to a confession, but only amounts to an admission of fact "no doubt of an incriminating fact, and which established the presence of the appellant in the deceased room". The dictum has been laid down in para 13 of the judgment which reads thus:-

" It is thus clear that an admission of a fact, however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act."

18. The case of State of **Kerala v. Ammini** (supra) was taken in appeal in the decision reported in A.I.R. 1998 S.C. 260 relied upon by the learned P.P. and in which the Supreme Court approved the view held by the Bench of the Kerala High Court observing that what the said accused had told the Doctors amounted to an admission and therefore was

admissible in evidence and the said admissions were not hit by any provisions of the Evidence Act.

19. However, in the case at hand we find from the evidence of P.W.8 Dr. Rodrigues that it is only A.1 who had injuries whilst the other two accused did not have any injuries. As far as the injuries of A.1 Prakash were concerned, A.1 has not given any explanation. The history given by the said three accused and recorded by Dr. Rodrigues has no connection whatsoever with any injuries which were found on their persons. In our opinion, since the said history given by the accused has no connection at all with the examination of the accused in relation to any injuries sustained by them the said history given by the accused can be considered as only an indirect attempt of admitting what is otherwise inadmissible. In fact, the said statements given by the accused in the form of history recorded by P.W.8 Dr. Rodrigues is in the nature of confession since it transgresses into the forbidden field designed by S.26. In our view, the said statements made by A.1 could have been relevant as admissions only in case they were made in connection with the injuries found on them and not otherwise. In our opinion therefore this part of the evidence has been rightly rejected by the Trial Court.

However, as far as the injuries found on the person of A.1 Prakash are concerned, A.1 Prakash has given no explanation whatsoever and in the absence of any explanation from the said accused it could be inferred that the said injuries might have been received by A.1 in the scuffle with the deceased. To that extent the circumstance of A.1 being found with the said injuries is a relevant circumstance proved by the prosecution which could form a link in the chain of circumstances proved.

20. The third circumstance proved by the prosecution is that all the three accused were found on the same day at Vasco-da-Gana quarreling among themselves in the bar owned by P.W.20 Prabhakar. P.W.20 Prabhakar has stated that at about 2.30 p.m. on 7.4.2001 all the accused had drinks in his bar known as "Sheetal Bar" and were talking among themselves and in that course started fighting with one another and were thus disturbing the other customers. He stated that all the three accused then stopped fighting and after some time paid the bill and went away. In cross-examination he stated that he could identify all the accused because they had a fight in the bar. He also had stated that he had phoned the police but before the police arrived, the accused had left the bar. The evidence of P.W.20

Prabhakar could be considered as yet another link in the story of the prosecution that soon after commission of robbery and murder the accused had proceeded to Vasco-da-Gama.

21. The fourth circumstance relied upon and proved by the prosecution is the attachment of a slip of paper (M.O.9) from the pocket of A.1 Prakash, the scooter having registration No.GA-02-C-1990 (MO.11) and purchase receipt of Madhu Sheela Jewellers (M.O.10) from possession of A.1 Prakash.

The attachment of these articles by I.O. Shri Banaulikar has been sufficiently corroborated by P.W.6 Antonio who was a panch witness to the said attachment. The recovery of gold ornaments namely MOs.21, 22 and 23 have been deposed to by P.W.9 Sebastiao who is a panch witness to the disclosure statement made by A.1 Prakash and subsequent recovery pursuant to the said statement from P.W.19 Shri Vithal who runs the said jewellery shop known as "Madhu Sheela Jewellers". P.W.15 Suresh, a motor cycle rider, has confirmed the sale of the said gold ornaments by A.1 Prakash to said P.W.19 Vithal. P.W.15 Suresh, P.W.16 Roland, P.W.17 Sudhir and P.W.18 Milan have all deposed regarding the purchase of the said scooter by A.1 Prakash soon after the

said sale of the gold ornaments to P.W.19. The learned Trial Court has rightly relied on the evidence of the said witnesses to conclude that soon after the robbery and murder A.1 Prakash was found in possession of the gold ornaments belonging to the deceased and which were identified by his brother P.W.1 Alex and son P.W.3 Marcelino and which were sold to the said P.W.19 Vithal. The learned Trial Court has also concluded that inference could be drawn that the purchase of the scooter was made by A.1 Prakash from the proceeds of the said sale.

P.W.31 stated that in view of the information received by him that A.1 Prakash and A.2 Rupesh had become good friends while in the judicial lock-up and A.3 Ramesh was also visiting them,he had kept a watch on their houses and that on 10.4.2001 at about 6 a.m. they saw A.1 Prakash coming on the said scooter towards his house and was taken in custody. He stated that on personal search apart from cash, details of which he has given, one small piece of paper (M.O.9) and a receipt (MO.10) were found. P.W.6 Antonio who was a panch witness to the said attachment has corroborated the version of P.W.31 and although P.W.6 was cross-examined at length, nothing has been elicited from his cross-examination to make his evidence unreliable. P.W.9 Sebastiao stated that

on 11.4.2001 he had remained present at the Police Station at the request of I.O. Shri Banaulikar and when A.1 was brought in their presence he gave his name as Prakash who further volunteered to show the shop where he had sold a gold chain, a finger ring and a gold sovereign. He stated that the statement made by A.1 Prakash was recorded in their presence and thereafter as per the instructions of A.1 they went to the said jewellery shop on the ground floor with a board displayed as "Madhu Sheela Jewellers" but the said shop was closed. He further stated that on 16.4.2001 he was called again at the Police Station where A.1 repeated the same statement made earlier before them on 11.4.2001 and after the said statement was recorded, they proceeded again to Vasco at the said Madhu Sheela Jewellers where A.1 pointed out to the said jeweller who recognised the accused and who gave his name as Vithal Shirodkar and he told them that he had purchased the gold ornaments such as gold chain with a broken hook, one ring and a gold sovereign all weighing 34.5 gms. and had paid the said accused Rs.10,350/-. He also stated that the counterfoils were attached in their presence and the said goldsmith handed over the said gold chain (MO.21) with broken hook, the gold ring (MO.22) and gold sovereign (MO.23) which he identified. P.W.15 Suresh confirmed having taken A.1 Prakash on 7.4.01

at about 5 or 5.30 p.m. to the said jewellery shop at Apna Bazar where A.1 Prakash told that he was having a gold chain, ring and a locket which were weighed and the weight was found to be around 32 gms. He also confirmed that the goldsmith had given a written slip to the accused as regards the balance payable to A.1 and also obtained the signature of the accused. P.W.19 Vithal in terms corroborated the entire version regarding the said recovery as given by I.O. Shri Banaulikar, the panch witness P.W.9 Sebastiao as well as P.W.15 Suresh in all material particulars. It has been contended on behalf of A.1 Prakash that there was no evidence on record to show that there was any information available to the I.O. that A.1 was going to come home at about 6 a.m. on 10.4.2001 so as to enable the I.O. to procure the presence of two witnesses. It is true that there is no specific statement made by the I.O. in that regard, but the fact remains that the I.O. would not have gone near the house of A.1 unless he had information about the arrival of A.1 Prakash in the morning of 10.4.2001. The I.O. had otherwise stated that a watch was kept at their houses. Next, it is submitted on behalf of A.1 Prakash that A.1 Prakash had confessed on 11.4.01 to have committed the offence and agreed to show the place of Madhu Sheela Jewellers where he had allegedly sold the stolen

property, but this was inconsistent because A.1 Prakash had allegedly confessed on 10.4.2001 to the I.O. when he was arrested that A.1 Prakash had taken more gold ornaments with him which were sold in Vasco. However, it is to be noted that there was no statement from A.1 Prakash at the relevant time on 10.4.01 that A.1 had volunteered to show either the place or person to whom the ornaments were sold by him. It may be true that the I.O. had the address of the goldsmith on 10.4.01 from the purchase receipt attached from A.1 Prakash but it could not be said that the I.O. also knew the place where the said ornaments were sold. The said place and the person to whom they were sold came to be discovered only pursuant to the disclosure statement made by A.1 which was recorded on 11.4.01. Even assuming that A.1 Prakash had told the I.O. on 10.4.01 itself about the place where the gold ornaments were sold the subsequent recovery of the same could not be held to be inadmissible. In this context we may refer to the case of **Karan Singh v. State of U.P.** (A.I.R. 1973 S.C. 1385) wherein it has been held that merely because the accused had first told the police that he would show them the knife and then took them to the place where it was hidden, his evidence leading to the discovery of the blood stained knife could not be said to be inadmissible on the ground that the police

already knew the place where the knife could be found. As stated by the I.O. the ornaments could not be recovered on 11.4.01 because the said goldsmith was not available. Since a disclosure statement of A.1 was recorded on 11.4.01 there was no need for the I.O. to have recorded the same statement again on 16.4.01 but he did the same probably to comply with the provisions of S.27 of the Evidence Act, as he understood them. The recovery made on 16.4.01 has got to be considered as recovery made on the basis of information provided by the accused on 11.4.01 and recorded in the presence of panch witnesses. The submission made on behalf of A.1 Prakash that it was no recovery at all within the meaning of S.27 of the Evidence Act has therefore got to be rejected. Likewise, the submission that the entire story of the said recovery of the gold ornaments is an afterthought on the part of the I.O. has also got to be rejected. The attachment of the slip of paper (MO.9) and the purchase receipt (MO.10) from A.1, and which have been explained by PW.19 Vithal are highly incriminating circumstances against A.1 Prakash. The recovery of gold ornaments sold by A.1 Prakash was also a highly incriminating circumstance. That the receipt M.O.10/Exh.22 was not maintained serialwise is no reason to discard the evidence of P.W.19 Vithal. The aforesaid

circumstance/s was rightly held by the trial Court as proved beyond reasonable doubt.

In our opinion, the trial Court was also justified in drawing the inference that the scooter purchased by A.1 Prakash was out of the proceeds from the sale of the gold ornaments sold by A.1 Prakash to P.W.19 Vithal. In this context P.W.15 Suresh had stated that, as told by A.1 Prakash, he waited for A.1 Prakash at about 9.30 a.m. on the next day when A.1 Prakash told him that he wanted a second-hand motorcycle or scooter whereupon he took A.1 to some garage and then to the house of Roland and thereafter the said Roland took him to his shop at Maimolem and showed him one LML Vespa. P.W.16 Roland has confirmed that P.W.15 Suresh came with him with one boy who was introduced as Prakash as a person interested in purchasing a scooter and thereafter he accompanied P.W.15 Suresh and A.1 Prakash to the shop of one Sudhir and the said Sudhir showed the scooter namely LML Vespa bearing No.GA02C-1990 quoting a price of Rs.5000/- and since the said Roland knew the said Sudhir, the price was reduced to Rs.4500/- and accordingly A.1 Prakash paid Rs.4500/- to the said Sudhir who handed over the said scooter with relevant documents. P.W.17 Sudhir in turn confirmed about the sale of the scooter for Rs.4500/- and identified A.1

Prakash as the person who had purchased the said scooter. He further stated that the said scooter was owned by Milan Ishrani. P.W.18 Milan Ishrani in his turn stated that as he was leaving to go abroad in the year 1993 - 1994, he had sold the said scooter to the said Sudhir for Rs.8000/- and had merely given a letter to him stating that he had sold the said scooter to him.

22. The fifth circumstance which has been proved by the prosecution is the attachment of the clothes of all the accused worn by them at the time of the commission of the crime.

As far as A.1 Prakash is concerned, P.W.6 Antonio also stated that on 11.4.2001 at about 3 p.m. A.1 Prakash made a statement before them that the clothes which were worn by him on the date of offence, were kept at his residence and he was willing to show the same in case they accompanied him to his house and after recording the said statement they went to the house of A.1 Prakash as per the directions given by A.1 Prakash and there from a string one shirt and one trouser was removed by A.1 Prakash stating that he had worn the said clothes on the date of murder of Peter. He identified the said shirt (M.O.13) and the said pant (M.O.14) further

stating that they had observed faint stains on the said shirt. P.W.6 had also stated that a panchanama was prepared and the said shirt and pant were sealed in their presence with their signatures.

As far as A.2 Rupesh is concerned, P.W.11 Alberto stated that A.2 Rupesh on 13.4.01 at about 4 p.m. had stated before them that the clothes worn by him on the date of the incident on 7.4.01 at about 11 a.m. were kept by him at Vasco-da-Gama and he was prepared to show the same. P.W.11 Alberto had stated that after the statement was recorded and their signatures taken they had proceeded to Vasco in the red light area as per directions given by A.2 Rupesh and thereafter the accused took them to one room and on knocking the door of the said room one lady opened the door and inside the room there was a cement sofa from where A.2 Rupesh removed one shirt and a pant which he identified as M.O.15 and M.O.16. According to him the shirt (MO.15) was of white colour with long sleeves having light black colour stripes. He further stated that the said clothes were packed and sealed in heir presence. The evidence of P.W.11 Alberto has been sufficiently corroborated by P.W.30 Sita who has identified A.2 Rupesh as the person with whom she spent the night by paying Rs.500/-. She stated that the said person namely A.2 Rupesh had

brought a plastic packet in which there was a shirt and pant and that before going on the next day at 7.30 a.m. A.2 Rupesh had worn the clothes which he had brought in the plastic bag and after about five days the police had come along with A.2 Rupesh and taken the clothes in the same condition. She identified the shirt (MO.15) and the jean pant (MO.16) as the clothes which the A.2 Rupesh had left in her room. It is true that P.W.30 Sita stated in cross-examination that the police had taken away the clothes in the same condition but the evidence of P.W.11 Alberto and P.W.31 Shri Banaulikar was more than sufficient to say that the said clothes were packed and sealed by the police.

As far as the clothes of A.3 Ramesh were concerned, P.W.13 Elidio stated that A.3 Ramesh had taken them to a room at Baina from where he had removed the clothes namely a shirt (MO.18) and a pant (MO.19) which were hanging on a clothesline stating that he had worn the said clothes on the day of incident and which clothes thereafter were packed and sealed in their presence. P.W.28 Parvati who is a commercial sex worker had stated that on 7.4.01 A.3 Ramesh had come to her for the purpose of prostitution and that he had changed the clothes while leaving the room. She stated that the shirt

and pant which were worn by him were kept in the said room stating that he would return in the night time but had not returned and the said clothes had remained till 4 or 5 days when the police officer came and took away the said clothes. She identified the said clothes namely the shirt (MO.18) and pant (MO.19).

23. P.W.31 Shri Banaulikar has deposed as regards the recovery of the said clothes of the three accused and his version has been corroborated particularly by P.W.6 Antonio, P.W.11 Alberto and P.W.30 Sita and P.W.28 Parvati. The said clothes were sent to CFSL and they were found with human blood stains though the group could not be determined. It was submitted on behalf of A.1 Prakash that A.1 Prakash had himself injuries on his person and therefore the said blood stains on his shirt could be those of his own. At first flush, the said explanation appears to be plausible. However, it is to be noted that A.1 Prakash also did not explain the injuries found on his person and in all probability it could be inferred that the said injuries were received by him in the scuffle which A.1 Prakash might have had with the deceased. If the blood of the deceased Peter, group of which could not be determined, had fallen on the wall and so also on the clothes worn by A.2

Rupesh and A.3 Ramesh, the human blood on the clothes of A.1 Prakash could be safely inferred to be that of the deceased Peter. The learned Trial Court had rightly relied on the case of **Sanjay alias Kaka v. State** (2001 Cri.L.J. 1231) in support of the proposition that only because the blood group could not be determined that the circumstance could not be said to be not proved. Earlier in the case of **State of Rajasthan v. Teja Ram and others** (1999 Cri.L.J. 2588) the Supreme Court had stated that the failure of the Serologist to detect the origin of the blood due to disintegration of the serum did not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood and when this happens there is no question of any guess work that the blood on the axe was animal blood. In the case at hand the blood on the clothes of the accused have been positively found to be of human origin and the accused have given no explanation whatsoever. A.1 Prakash has also not given any explanation for his injuries. In the aforesaid case the Supreme Court has stated that the effort of the criminal court should not be to prowl for imaginative doubts. In our view these

circumstances were also strong circumstances connecting the accused with the death of the deceased Peter.

24. The fifth circumstance proved was the recovery of the gold ring of the deceased (MO.20) by P.I. Shri Banaulikar at the instance of A.2 Rupesh. This was proved through the evidence of P.W.9 Sebastiao who had stated that on 14.4.01 A.2 Rupesh who was brought before them had stated that he had sold the stolen ring to one person by name Shivanand from Baina for Rs.1500/- and had volunteered to show the said person. P.W.9 Sebastiao had also stated that thereafter they had gone to Baina as shown by A.2 Rupesh and there A.2 Rupesh had pointed out to the person to whom he had sold the said gold ring and the said person gave his name as Shivanand and identified A.2 Rupesh as the person from whom he had purchased the gold ring for Rs.1500/- and that thereafter they had returned with the said ring. The said ring (MO.20) was identified by him. In cross-examination P.W.9 Sebastiao did state that he had acted as a panch witness in another murder case i.e. Tavora murder case and that he had acted as a panch because he knew the family of Tavora. In our view only because P.W.9 Sebastiao had acted as a panch witness in another case his evidence could not be discarded

as that of a person who was at the beck and call of the police. Moreover, what was stated by P.I. Shri Banaulikar and P.W.9 Sebastiao was also corroborated by P.W.24 Somnath who had confirmed that he had purchased the said ring (MO.20) from A.2 Rupesh for Rs.1500/-. It follows that A.2 Rajesh was found in possession of the said ring (MO.20) which he sold to P.W.24 Somnath and received from him Rs.1500/- for the same. This recovery at the instance of A.2 Rajesh was sufficiently proved by the prosecution.

25. The sixth circumstance of the recovery of Wester Quartz watch (MO.17) at the instance of A.3 Ramesh was sufficiently proved by the prosecution with the evidence of P.W.13 Elidio. P.W.13 Elidio had stated that A.3 Ramesh had told them that he would show the place where he had sold the watch. P.W.13 Elidio had further stated that after recording the statement of A.3 Ramesh they had proceeded to Vasco by a police jeep as per the directions given by A.3 Ramesh and on reaching Baina the jeep was stopped, again as per the directions of A.3 Ramesh and thereafter A.3 Ramesh took them to a place where there was a wooden platform where one person was sitting and A.3 Ramesh pointed out to him as the person to whom he had sold the said watch. He stated that the said person on being asked had given his

name as Samarjeet and he identified A.3 Ramesh and admitted having purchased the watch for Rs.170/- and the said Samarjeet went to his house which was closeby and brought the said wrist watch (MO.17) which was packed and sealed in their presence. He had identified the said watch (MO.17). P.W.14 Samarjeet in his evidence had confirmed that on 7.4.01 at about 8 to 8.30 p.m. A.3 Ramesh had come and told him he was in need of money and had given him a gold-plated watch. He stated that A.3 Ramesh had not sold the watch to him and had told him only to keep the watch and give money to him as he was in need of the same promising to take the watch afterwards. In cross-examination he had stated that he had not told the police that he had agreed to buy the said watch for Rs.170/- or that he had bought the same. Whether P.W.14 Samarjeet had purchased the watch from A.3 Ramesh or whether A.3 Ramesh had merely pawned it to him, the fact would not be of much significance since the said watch (MO.17) was recovered pursuant to the information given by A.3 Ramesh from P.W.14 Samarjeet. P.W.14 had stated that A.3 Ramesh had told him when he gave the said watch that his wife was sick. The recovery of the said watch (MO.17) at the instance of A.3 was sufficiently proved by the prosecution with the evidence of P.W.13 Elidio as well as P.W.14 Samarjeet and the same was

certainly another incriminating circumstance proved by the prosecution.

26. As far as the articles which have been recovered at the instance of the said accused, the same were sufficiently identified as belonging to the deceased Peter by his brother P.W.1 Alex and his son P.W.3 Marcelino. The said articles might have been described differently by different witnesses, for example M.O.23 was identified either as a pendant or a sovereign or a locket. A particular object or article could be described in different words and yet could be identified to be the same. The same thing could be said of the watch (MO.17) the brand name of which has been typed differently at different places either due to improper diction or a mistake on the part of the typist. In our view the trial Court was right in accepting the identification of the said articles as articles belonging to the deceased.

27. On behalf of the accused, it was submitted that the prosecution had not explained as to how the accused had left the house because the door of the house was found closed by P.W.3 Marcelino. We do not think that this situation required any particular explanation on the part of prosecution because it is common knowledge that nowadays people do have locks

to the doors, which by merely pulling the door, the door gets locked.

28. Another submission made on behalf of the accused is that the charge against the accused was framed as if the incident took place on 7.3.01, but the entire evidence which has been led by the prosecution alleged an offence which took place on 8.4.01 and therefore the trial is vitiated due to wrong framing of charge. In this context it may be observed that the deceased Peter was last seen particularly in the company of A.1 and A.3 on 7.4.01 and the dead body of the deceased Peter was found on 8.4.01 and the entire evidence has been led with reference to the said two dates namely 7.4.01 and 8.4.01. The charge ought to have been framed not with reference to 7.3.01 but with reference to 7.4.01. However, it is not the case of any of the accused that they have been prejudiced by the said wrong framing of the charge. If that was the case the matter could have been looked at differently. Reference to Section 215 of Cr.P.C. could be made at this stage. It provides that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused

was in fact misled by such error or omission, and it has occasioned a failure of justice. As already stated, it is not the case of any of the accused that any prejudice has been caused to them by mentioning the date in the charge as 7.3.01 instead of 7.4.01. We are therefore not inclined to accept that the trial has been vitiated on account of the said error. The case at hand is covered by explanation (d) to Section 215 of Cr.P.C. and therefore we are not inclined to follow the view held by the Madhya Pradesh High Court in the case of **Sukdev v. State of M.P.** (1995 (2) Crimes 336).

29. Another submission made on behalf of the accused is that the prosecution has suppressed the best evidence in the form of finger print report. It has been submitted that the finger prints of none of the accused were produced despite the same having been taken from the scene of offence. It is the submission made on behalf of the accused that the prosecution having suppressed the said evidence which would directly link the accused with the offence, adverse inference has got to be drawn against the prosecution in terms of Section 114(g) of the Indian Evidence Act.

30. We are not impressed with the said submission.

As already stated it was recorded in the scene of offence panchanama itself (Exh.PW.2/A) that the services of the dog squad and the finger print operator did not provide any positive clues. P.W.31 Shri Banaulikar had also stated in his evidence that the report of finger print operator and dog squad were no use in the investigation. The defence chose to accept the said statement of P.W.31 Shri Banaulikar without any further cross-examination on the same and therefore the defence now cannot be permitted to raise an issue that an adverse inference has got to be drawn against the prosecution. The prosecution was not bound to produce the report which had not at all helped them in the investigation of the case. At this stage reference could be made to the case of **Sarwan Singh v. State of Punjab** (supra) wherein the Supreme Court has observed that it is a rule of essential justice that whenever the opponent declines to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted. In the circumstances of the case we are not inclined to draw an adverse inference against the prosecution for non-production of the said reports.

31. The last submission made on behalf of A.1 Prakash is that if death is caused in order to the

committing of theft or in committing of theft or in carrying away or attempting to carry away property obtained by theft, and for that end, it is robbery and not murder. It is further submitted that Section 390 I.P.C. includes culpable homicide not amounting to murder and therefore when a person commits culpable homicide not amounting to murder in the course and for the purpose of committing robbery or whilst carrying away or attempting to carry away the property obtained by theft he can be convicted under Section 392 only and he cannot be convicted u/s 392 I.P.C. as well as under S.302 I.P.C. as long as an independent separate intention on the part of the person is established to also independently commit murder, which situation is conspicuously absent in the present case. It is submitted that S.392 I.P.C.prescribes punishment for ten years and fine and this severe punishment is provided because simple theft becomes robbery only when in order to commit theft or to carry away stolen articles, the person committing theft causes death. It is further submitted that robbery covers culpable homicide under Section 304 I.P.C., more particularly Section 304(II) because in every robbery the intention of the robber is to commit robbery and not death. It is further submitted that the so called circumstances proved on record may be said to establish a culpable homicide

not amounting to murder and not murder because no circumstance shows the intention on the part of A.1 Prakash to cause death or to cause such bodily injury likely to cause death or bodily injury sufficient in the ordinary course of nature to cause death or an act so imminently dangerous that it must in all probability cause death or such bodily injury likely to cause death has been established.

32. We are unable to accept the above submissions made on behalf of A.1 Prakash.

33. Section 390 I.P.C. defines robbery and states that in all robbery there is either theft or extortion and, theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. We are unable to subscribe to the view that when robbery is committed by a person if death is caused for that end, such death is not a separate offence and cannot be punished separately. Holding such a view would amount to saying that if murder is to be committed it

would be better to rob a person and commit his murder for in that event one would be liable to be punished only for 10 years and not with life or death imprisonment. We are fortified in our view by illustration (m) to Section 220 of the Code of Cr. Procedure, 1973 which reads as follows :-

" A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of offences under Sections 323, 392 and 394 I.P.C."

Legislature could not have intended to the contrary, as submitted on behalf of A.1. Therefore, the accused were rightly charged and tried under both sections.

34. The case at hand is a case purely based on circumstantial evidence and it is the circumstances which have to speak out clearly and loudly. It may be that the accused entered without any weapon, but there is no evidence to suggest for what end the murder was committed. To say that it was committed for the purpose of robbery would be only to enter in the arena of speculation. It is quite possible and probable that the deceased Peter was done away with so as to wipe out the evidence of robbery.

35. We have already noted the number of injuries found on the person of the deceased, the fact that the torch itself was broken into pieces and blood found not only on the walls but on the clothes of the accused. P.W.7 Dr. Sapeco opined that the injuries inflicted upon the deceased were sufficient in the ordinary course of nature to cause death. The accused picked up the said torch as the weapon of offence and the number of injuries on the deceased shows, that he was assaulted mercilessly on vital parts of his body and therefore the case against the accused was certainly covered by clause 3rdly of S.300 I.P.C. In the case of **Virsa Singh v. State of Punjab** (A.I.R. 1958 S.C.465) the Hon'ble S.C. has stated that the prosecution must prove the following facts before it can bring a case under S.300 "thirdly"; First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and fourthly, it must be proved that the injury of the type, just described, made up of the three elements set out above, was sufficient to cause death in the

ordinary course of nature and this part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender and once these four elements are established by the prosecution, the offence is murder under S.300 "thirdly". The Supreme Court has stated that it does not matter that there was no intention to cause death, or that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (there is no real distinction between the two), or even that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has the licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences and they can only escape if it can be shown or reasonably deduced that the injury was accidental or otherwise unintentional. In our view the evidence of P.W.2 Alex and P.W.7 Dr. Sapeco was sufficient to conclude that the accused

had committed the murder of the deceased Peter and the case of the prosecution was well covered under clause (3rdly) of S.300 I.P.C.

36. The learned Trial Court was fully justified in drawing the inference that the accused were guilty of robbery as well as murder on account of their failure to provide any explanation for their recent and unexplained possession of the articles belonging to the deceased. Way back in the case of **Wasim Khan v. The State of Uttar Pradesh** (A.I.R. 1956 SC 400) the Supreme Court stated that :-

" The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognized. "

" Under these circumstances, and in the absence of any explanation, the presumption arises that any one who took part in the robbery also took part in the murder. In cases in which murder and

robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder. "

37. Now, in the case of **Ezhil and others v. State of Tamil Nadu** (2002 AIR SCW 2060) the Supreme Court has again held that in the absence of reasonable and plausible explanation by the accused persons as to legitimate or origin of their possession of articles of the deceased presumption can be drawn not only of fact that they were in possession of the stolen articles after committing robbery but also committed murder of the deceased. In fact the Supreme Court also approved the sentence imposed against the accused of ten years for robbery and life imprisonment for murder as not being harsh and grossly disproportionate.

38. As far as a conviction based on circumstantial evidence is concerned, the law is well settled with the case of **Sharad Birdichand Sarda v. State of Maharashtra** [(1984) 4 SCC 116] wherein the Supreme Court laid down what are known as five golden principles of proof of a case based on circumstantial

evidence. In the case of **Balu Sonba Shinde v. State of Maharashtra** [(2002) 7 SCC 543] the Supreme Court has stated that: "While appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstances relied upon must be found to have been fully established and the cumulative effect of all facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that the prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise " (emphasis supplied).

39. In our view the circumstances proved by the prosecution have been conclusively proved and when taken cumulatively, complete a chain of circumstances which point out to the guilt of the accused. In

other words, the chain of the said circumstances is such that there is no ground for a conclusion which is compatible with the innocence of the accused. As far as the motive was concerned, it was the case of the prosecution that the motive was of robbery. It is well settled that where the case of the prosecution has been proved beyond reasonable doubt on basis of the materials produced before the court, the motive loses its importance. Motive is, as stated by the Supreme Court in the case of **Sakharam v. State of Madhya Pradesh** [(1992) 2 S.C.C. 153] is a plus point. As far as the motive is concerned, the motive was none other than committing robbery of articles of the deceased Peter. In our view, therefore, the conviction recorded against all the accused by the learned Trial Court under Sections 393, 302 r/w S.34 I.P.C. could not be faulted.

40. As far as the sentence imposed on the accused is concerned, life imprisonment as a measure of punishment is the rule under S.302 I.P.C. which has been imposed upon the accused. It has been submitted on behalf of A.1 Prakash that A.1 Prakash was a patient in the Institute of Psychiatry and Human Behaviour and since A.1 Prakash has already undergone more than three years of imprisonment from the time he was incarcerated from 10.4.02, the said punishment

should be considered as sufficient and therefore A.1 Prakash could be released by treating the said period substantial sentence imposed upon him.

41. We are not inclined to accept the said submission.

42. The records show that at one stage A.1 Prakash had made a request to the learned Trial Court that he was under mental depression and that earlier he was treated from 20.9.98 to 10.10.98 and therefore he should be referred to the Institute of Psychiatry and Human Behaviour, Panaji. It also appears that subsequently A.1 Prakash by virtue of letter dated 27.11.02 was found that he had personality disorders with below average intelligence but had no psychotic features and was fit to stand trial. He was advised regular medication. In our view neither the medical certificate dated on 27.11.02 nor the medical certificate dated 11.12.02 are sufficient to impose on A.1 Prakash any lesser punishment than he would otherwise deserve. The learned trial Court has awarded the maximum punishment to the accused under S.392 I.P.C. The trial Court did consider the age of the accused which is certainly one of the factors which needs to be considered, considering that the accused caused the death of the deceased Peter to

take away his valuables.

43. A sentence is a debt which a criminal is required to pay to the Society at large. Imposing a sentence which is adequate is always a difficult task. Deterrence and retribution have remained over the years as two important facets of punishment. The Court is required to look at the interests of the Society at large, the criminal, the victim, attending circumstances and hosts of other variable factors. In the case at hand, the accused might have known that the deceased was working abroad and might have had lot of money. They did away with him to enrich themselves. The sentences imposed upon the accused do not call for interference.

44. In the light of what is stated hereinabove, we find that there is no merit in the appeals filed and therefore they are hereby dismissed.

S.A. BOBDE, J.

N.A. BRITTO, J.

sl.